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5 FLORA GONZALES, on behalf of herself
6 and all others similarly situated and on
7 behalf of the general public,
8

9 No. C 18-06630 WHA
10

11 Plaintiffs,

12 v.
13 EMERITUS CORPORATION,
14 SUMMERVILLE AT ATHERTON
15 COURT LLC, BROOKDALE LIVING
16 COMMUNITIES, INC., BROOKDALE
SENIOR LIVING COMMUNITIES, INC.,
BROOKDALE VEHICLE HOLDING,
LLC; and Does 1 through 50, inclusive,
17

18 Defendants.
19 **ORDER RE MOTION TO
COMPEL ARBITRATION**

20

21 **INTRODUCTION**

22 In this PAGA and wage-and-hour putative class action, defendants move to compel
arbitration. For the reasons stated below, the motion to compel arbitration is **GRANTED IN PART**
AND DENIED IN PART.

23 **STATEMENT**

24 In September 2019, the California Supreme Court held that the “amount sufficient to
recover the underpaid wages” under California Labor Code Section 558(a) could not be brought
as part of a PAGA claim. *ZB, N.A. v. Superior Court of San Diego Cty.*, 8 Cal. 5th 175 (2019).

25
26 In brief, under California’s Private Attorneys General Act of 2004, an aggrieved
employee may seek *civil penalties* for Labor Code violations committed against her and other
aggrieved employees by bringing — on behalf of California — a representative action against

1 her employer. If the aggrieved employee prevails, the California Labor and Workforce
2 Development Agency collects 75 percent of the penalties, and the aggrieved employees receive
3 the remainder. Cal. Labor Code § 2699(i) (2016).

4 Section 558(a) is one of many provisions in the Labor Code which imposes “civil
5 penalties” on employers. *See, e.g., id.* §§ 225.5, 226.8(b), 1174.5. Specifically, Section 558(a)
6 provides as follows (emphasis added):

7 (a) Any employer . . . who violates . . . any provision
8 regulating hours and days of work in any order of the
9 Industrial Welfare Commission shall be subject to *a civil*
10 *penalty as follows:* (1) For any initial violation, fifty dollars
11 (\$50) for each underpaid employee for each pay period for
12 which the employee was underpaid *in addition to an amount*
13 *sufficient to recover underpaid wages.* (2) For each
14 subsequent violation, one hundred dollars (\$100) for each
15 underpaid employee for each pay period for which the
16 employee was underpaid *in addition to an amount sufficient*
17 *to recover underpaid wages.* (3) *Wages recovered pursuant*
18 *to this section shall be paid to the affected employee.*

19 In other words, under Section 558(a), certain employers are liable for penalties of either \$50 or
20 \$100 per employee for each pay period the employee was underpaid *in addition to an amount*
21 *sufficient to recover the underpaid wages, which underpaid wages would be paid directly to the*
22 *affected employee.* Primarily, this language begs the question of whether or not the underpaid
23 wages amount is a civil penalty or a remedy imposed by the statute in addition to the civil
24 penalty.

25 In 2012, the California Court of Appeal held that the underpaid wages constitute a civil
26 penalty. *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal. App. 4th 1112, 1144–48 (2012).
27 That is, both the \$50 and \$100 fines and the “amount sufficient to recover the underpaid wages”
28 could be the subject of a PAGA claim.

29 Having decided that the underpaid wages in Section 558(a) constituted a civil penalty, a
30 different issue materialized in constructing the underpaid wages of Section 558(a). That is,
31 whether the underpaid wages could be separately compelled to arbitration even if the
32 representative PAGA claims remained in court. In brief, one California Court of Appeal
33 decision said yes, and another said no. *Esparza v. KS Indus., L.P.*, 13 Cal. App. 5th 1228,
34 1234–35 (2017), *review denied*, S244005 (Cal. Nov. 15, 2017); *Lawson v. ZB, N.A.*, 18 Cal. App.

1 5th 705, 714 (2017), *as modified* D071279, D071376 (Cal. Dec. 21, 2017), *aff’d but criticized*
2 *sub nom.* *ZB, N.A. v. Superior Court of San Diego Cty.*, 8 Cal. 5th 175, 193–96 (2019).

3 This split in authority bled into federal court. An unpublished opinion from our court of
4 appeals found *Esparza*’s reasoning more persuasive — and held that underpaid wages could be
5 separately compelled to arbitration. *Mandviwala v. Five Star Quality Care, Inc.*, 723 F. App’x
6 415, 417–18 (9th Cir. 2018). But within months, a judge from this district disagreed and found
7 *Lawson* more persuasive — and held that underpaid wages could not be separately compelled to
8 arbitration. *Whitworth v. SolarCity Corp.*, 336 F. Supp. 3d 1119, 1124–26 (N.D. Cal. 2018)
9 (Judge Jacqueline Scott Corley). In between, the undersigned judge adopted our court of
10 appeals’ reasoning in *Mandviwala*. *Cabrera v. CVS Rx Services, Inc.*, No. C 17-05803 WHA,
11 2018 WL 1367323 (N.D. Cal. Mar. 16, 2018).

12 On March 21, 2018, the California Supreme Court granted review of *Lawson* seemingly
13 to decide this split in authority. The California Supreme Court resolved the split by overruling
14 *Thurman*. Section 558(a)’s underpaid wages were *not* civil penalties after all and could not even
15 be brought under PAGA, the California Supreme Court held. *ZB, N.A.*, 8 Cal. 5th at 193–96.

16 The California Supreme Court began its analysis by admitting that “at first glance, a
17 plausible reading of [Section 558]” was that all which came after the colon were subclasses of
18 the term “civil penalty” — the term which preceded the colon in Section 558(a). *Id.* at 189.
19 Still, the California Supreme Court concluded that the best way to “harmonize[S]ection 558’s
20 provisions with each other and with the broader statutory scheme,” was to give more weight to
21 the words “*in addition to*” in Subdivisions One and Two of Section 558(a). *Id.* at 193. That is,
22 “ ‘in addition to’ appears to indicate . . . that these provisions subject the employer to a civil
23 penalty *on top of, not including*, an amount meant to compensate for unpaid wages.” *Id.* at 189
24 (emphasis added).

25 In other words, on the specific question of whether PAGA claims for unpaid wages under
26 Section 558(a) could be severed and compelled to arbitration, the California Supreme Court did
27 not side with either *Lawson* or *Esparza* — it instead mooted the issue entirely. PAGA plaintiffs
28 could not bring underpaid wages claims under Section 558(a) at all. The California Supreme

1 Court then remanded to the trial court to decide whether the unpaid wages should be struck or
2 whether the complaint should be amended “to request unpaid wages under an appropriate cause
3 of action.” *Id.* at 198.

4 * * *

5 In this case, as alleged in the complaint, plaintiff Flora Gonzales worked as a medical aid
6 and technician for seventeen years, providing care to senior citizens in a senior citizen facility.
7 For the first fourteen of those years, either defendant Emeritus Corporation or defendant
8 Summerville At Atherton Court LLC owned and operated the facility. Then, in 2014, three
9 entities — defendant Brookdale Senior Living, Inc., defendant Brookdale Living Communities,
10 Inc., and defendant Brookdale Vehicle Holding, LLC — acquired the facility and imposed a new
11 strict mandatory dispute resolution policy on the employees (Withers Decl. ¶¶ 4–6) (Dkt. No. 1-2
12 at 4).

13 No ability to opt out of this policy existed. To the contrary, the policy bound employees
14 automatically when they showed up to work. The arbitration agreement provided: “I understand
15 that even if I do not sign this [a]greement, if I come to work after being given this agreement, I
16 am agreeing to it and so is Brookdale” (*id.* ¶ 6) Moreover, refusal to sign a handbook — which
17 provided mere detail on the arbitration process — would “result in [plaintiff’s] immediate
18 termination of employment.”

19 Other provisions within the arbitration agreement took away more rights in connection
20 with the ability to bring class action and PAGA claims. More specifically, Section Eight of the
21 arbitration agreement provided: “[c]lass action waiver. There is no right or authority under this
22 [a]greement for any dispute to be brought, heard or arbitrated as a class or collective action” (*id.*
23 § 8). Section Nine of the arbitration agreement provided: “[PAGA] waiver. There is no right or
24 authority for any dispute to be brought, heard or arbitrated as a private attorney general action.”
25 With respect to this PAGA waiver, however, the arbitration agreement also specifically provided
26 that “[t]his provision can be removed from the [a]greement in a case where the dispute is filed as
27 [a] private attorney general action and the court finds this waiver unenforceable. If that happens,
28 then the private attorney general action will be litigated in that court” (*id.* § 9).

In 2014, our plaintiff signed both the arbitration agreement and the handbook. In 2017, the facility terminated plaintiff's employment.

In July 2018, plaintiff initiated this PAGA and wage-and-hour putative class action against defendants in Alameda County Superior Court, asserting six claims under the California Labor Code, including relief under Section 558(a), and one additional claim under Section 17200 of the California Business and Professions Code. She asserted four of the Labor Code claims as representative PAGA claims.

In October 2018, defendants removed the action to our district court. Defendants moved to compel arbitration of all claims based on the executed arbitration agreement between the parties. Plaintiff opposed (Dkt. Nos. 1, 14, 15).

11 Primarily, the parties disagreed on the following three points: (i) whether or not the
12 arbitration agreement could be enforced at all; (ii) if the arbitration agreement could be enforced,
13 whether or not the contractual “waiver” of the ability to assert PAGA claims could be enforced;
14 and (iii) if the contractual “waiver” of the PAGA claims could not be enforced, whether the
15 underpaid wages sought by the complaint under Section 558 could be separated from the rest of
16 the PAGA claims and compelled to arbitration.

17 After oral argument in December 2018, an order stayed the action in full pending the
18 California Supreme Court’s decision in *Lawson* (Dkt. No. 19).

19 Following the California Supreme Court’s decision, the parties filed a joint status report.
20 Plaintiff maintained that the motion to compel should be denied, but that leave be granted “to
21 amend her [c]omplaint regarding the penalties sought under Labor Code § 558” (Dkt. No. 23 at
22 2). Defendants requested that the arbitration agreement be enforced in full, but that in the
23 alternative, “the PAGA claim must be stayed pending individual arbitration” (*id.* at 4). An order
24 set a new hearing (Dkt. No. 25). Following that hearing, the parties provided supplemental
25 briefing. This order now follows.

ANALYSIS

27 This order *first* holds that the arbitration agreement is enforceable. All claims within the
28 scope of the arbitration agreement must be sent to arbitration. Still, the class-action “waiver”

1 provides “no right or authority *under this [a]greement* for any dispute to be arbitrated as a class
2 or collective action” and so, the undersigned leaves it to the arbitrator to decide whether there is
3 other authority for which plaintiff does have a right to bring a class or collective action.

4 *Second*, as to the PAGA claims, this order holds that plaintiff’s PAGA waiver is
5 *unenforceable* under binding precedent. Pursuant to the arbitration agreement, the representative
6 PAGA claims remain in the district court and will *not* be sent to arbitration. *Third*, turning to the
7 claims for unpaid wages brought under Section 558, leave to amend the complaint will be
8 permitted so that any claims for unpaid wages alleged under PAGA may comply with *ZB, N.A. v.*
9 *Superior Court of San Diego County*, 8 Cal. 5th 175 (2019). For efficiency, the representative
10 PAGA claims will be stayed pending the results of arbitration of the individual claims. The
11 details follow.

12 **1. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE.**

13 Under the Federal Arbitration Act, a district court determines “whether a valid arbitration
14 agreement exists and, if so, whether the agreement encompasses the dispute at issue.” *Lifescan,*
15 *Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004). Here, the parties
16 agree that the agreement encompassed the claims at issue. The arbitration agreement provided
17 that “any legal dispute arising out of or related to [plaintiff’s] employment . . . must be resolved
18 using final and binding arbitration and not by a court or jury trial. That includes any legal
19 dispute that has to do with any of the following: wage and hour law, . . . unfair competition,
20 compensation, breaks or rest periods” (Withers Decl. ¶ 6, Exh. A. § 1) (emphasis in original).

21 Plaintiff argues that the arbitration agreement is invalid and therefore should not be
22 enforced due to alleged unconscionability and due to a perceived ambiguity in the PAGA
23 waiver. Both arguments fail.

24 Turning to plaintiff’s first argument, the parties agree California state law applies.
25 “Under California law, a contractual clause is unenforceable if it is *both* procedurally and
26 substantively unconscionable.” *Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1072 (9th Cir.
27 2007) (emphasis added) (overruled on other grounds). Here, a high degree of unconscionable
28 procedure permeates the provision at issue in that defendants imposed the arbitration agreement

1 on plaintiff without even requiring her signature (although she did sign it) and under threat of
2 terminating her fourteen-year employment. But procedural unconscionability is not enough to
3 invalidate an arbitration agreement on its own, and plaintiff has made an insufficient showing of
4 any overly harsh or one-sided result created by the agreement.

5 Plaintiff argues that the absence of “[p]laintiff’s rights to meaningful discovery” under
6 the agreement satisfies a minimalist version of substantive unconscionability. Any assertion that
7 plaintiff will be deprived of meaningful discovery in arbitration, however, glides over the
8 arbitration agreement itself. On discovery, the arbitration agreement is explicit: “[d]iscovery
9 will be conducted as directed by law or the [a]rbitrator” and the arbitrator may “issue subpoenas,
10 if needed, for witnesses or documents” (Withers Decl. ¶ 6, Exh. A. § 1). The Court therefore
11 can — and does — fully expect that reasonable discovery will be afforded by the arbitrators.

12 Next, plaintiff argues that the following sentences in the PAGA waiver create ambiguity
13 which invalidate the entire agreement: “[t]his provision can be removed from the [a]greement in
14 a case where the dispute is filed as [a] private attorney general action and the court finds this
15 waiver unenforceable. If that happens, then the private attorney general action will be litigated
16 in *that court*” (*id.* § 1) (emphasis added). The ambiguity here, according to plaintiff, is the
17 emphasized phrase “*that court*.”

18 Even assuming the phrase is in fact ambiguous, this provision can be severed and
19 therefore does not invalidate the entire agreement. Moreover, the PAGA waiver is also
20 self-contained in its own section of the arbitration agreement. Furthermore, the arbitration
21 agreement’s main purpose is to impose arbitration. The PAGA waiver is therefore not central,
22 but collateral, to the purpose of the agreement.

23 Plaintiff has not met her burden to show that the arbitration agreement is unenforceable.
24 Because the agreement is valid and encompasses the claims at issue, the non-PAGA claims must
25 be arbitrated. The next section will now detail why the PAGA waiver is invalid and why the
26 PAGA claims must therefore remain in this forum.

27

28

1 **2. THE PAGA WAIVER IN THE AGREEMENT IS NOT ENFORCEABLE.**

2 As stated, the arbitration agreement included a waiver of all claims brought under PAGA.
3 Both the California Supreme Court and our court of appeals have specifically held that these
4 waivers are not enforceable. *See Iskanian v. CLS Transport. Los Angeles, LLC*, 59 Cal. 4th 348,
5 382–84 (2014); *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 430–40 (9th Cir. 2015).
6 As such, under this binding precedent, the arbitration agreement’s PAGA waiver remains
7 unenforceable.

8 In this connection, the representative PAGA claims must remain in this forum. More
9 specifically, the arbitration agreement provided that “[t]his provision can be removed from the
10 [a]greement in a case where the dispute is filed as [a] private attorney general action and the
11 court finds this waiver unenforceable. If that happens, then the private attorney general action
12 will be litigated in that court” (Withers Decl. ¶ 6, Exh. A at § 9). The parties agree that if the
13 waiver is struck, this provision now refers to the undersigned. The PAGA claims will remain
14 here.

15 Defendants argue that *Sakkab* and *Iskanian* have been implicitly overruled by the United
16 States Supreme Court’s 2018 decision *Epic Systems Corporation v. Lewis*, 138 S. Ct. 1612
17 (2018). In *Epic Systems*, the Supreme Court held that contract defenses which invalidated
18 arbitration agreements were a “device” that manifested “judicial antagonism” towards arbitration
19 and were therefore preempted by the Federal Arbitration Act. *Id.* at 1623.

20 When prior circuit precedent has not been explicitly overruled, the analysis turns on
21 whether “the relevant court of last resort . . . undercut the theory or reasoning underlying the
22 prior circuit precedent in such a way that the cases are *clearly irreconcilable*.” *Miller v.*
23 *Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (emphasis added). As relevant here, the reasoning
24 which anchored the Supreme Court’s decision in *Epic Systems* is far enough from the reasoning
25 which anchored the California Supreme Court’s decision in *Iskanian* and our court of appeals’
26 decision in *Sakkab* that *Sakkab* remains binding.

27 In *Iskanian*, the California Supreme Court held that an arbitration agreement requiring an
28 employee as a condition of employment to give up the right to bring representative PAGA

1 actions in any forum is contrary to public policy. Specifically, PAGA waivers harm California
2 in two particular ways, neither of which have anything to do with arbitration. The California
3 Supreme Court stated that “agreements requiring the waiver of PAGA rights would *harm the*
4 *state’s interests in enforcing the Labor Code and in receiving the proceeds of civil penalties used*
5 *to deter violations.*” *Iskanian*, 59 Cal. 4th at 383 (emphasis added). Based on this reasoning, our
6 court of appeals in *Sakkab* succinctly concluded:

7 The California Supreme Court’s decision in *Iskanian*
8 expresses no preference regarding whether individual
9 PAGA claims are litigated or arbitrated. It provides only
that representative PAGA claims may not be waived
outright. The *Iskanian* rule does not prohibit the arbitration
of any type of claim.

10 803 F.3d at 434 (citations omitted). Put simply, PAGA waivers are invalid because they hurt
11 California’s interest in enforcing the Labor Code and not because of any reason that has anything
12 to do with arbitration. Therefore, our court of appeals held in *Sakkab*, that the Federal
13 Arbitration Act did not preempt the California Supreme Court’s decision in *Iskanian*. *Id.* at 439.
14 For these same reasons, the holdings of *Epic Systems* and *Sakkab* are therefore not clearly
15 irreconcilable and this order remains bound by *Sakkab*.

16 Defendants’ arguments to the contrary are unavailing for the specific reason that none
17 demonstrates that our court of appeals’ decision in *Sakkab* is clearly irreconcilable with the
18 United States Supreme Court’s decision in *Epic Systems*.

19 The PAGA waiver in this agreement must be and hereby is held invalid. Under the
20 agreement, the representative PAGA claims must remain in this forum. The arbitrability of any
21 unpaid wages claims under Section 558 need not be addressed in light of the California Supreme
22 Court’s decision in *ZB, N.A. v. Superior Court of San Diego County*, 8 Cal. 5th 175 (2019).

23 **3. LEAVE TO AMEND COMPLAINT AND STAY OF PAGA CLAIMS.**

24 In light of the decision by the California Supreme Court clarifying the ability to allege
25 unpaid wages under PAGA, justice requires that plaintiff be granted leave to amend her PAGA
26 claims to comply with the California Supreme Court’s recent decision in *ZB, N.A. v. Superior*
27 *Court of San Diego County*, 8 Cal. 5th 175 (2019). Accordingly, leave to amend the complaint is
28 **GRANTED IN PART AND DENIED IN PART.** Plaintiff may amend the unpaid wages aspect of her

1 PAGA claims only to allege unpaid wages under a Labor Code provision other than Section
2 558(a).

3 Under 9 U.S.C. § 3, the Court “shall on application of one of the parties stay the trial of
4 the action until such arbitration has been had in accordance with the terms of the agreement.”
5 Our court of appeals has acknowledged that this language “seems to direct that the action ‘shall’
6 be stayed pending completion of arbitration.” *Johnmohammadi v. Bloomingdale’s, Inc.*, 755
7 F.3d 1072, 1073 (9th Cir. 2014); *see also Kilgore v. KeyBank, Nat’l Ass’n*, 718 F.3d 1052, 1057
8 (9th Cir. 2013). In light of this dictum, and because plaintiff’s PAGA claims are derivative of
9 the substantive claims which will proceed to arbitration, the representative PAGA claims are
10 hereby **STAYED** pending the results of the arbitration proceeding.*

CONCLUSION

12 To the extent stated, defendants’ motion to compel arbitration is **GRANTED IN PART AND**
13 **DENIED IN PART**. The motion is **GRANTED** as to plaintiff’s individual claims which are
14 **ORDERED** to individual arbitration. The motion is **DENIED** as to the representative PAGA
15 claims, which remain in this forum. Those claims are **STAYED** pending arbitration. Leave to
16 amend the complaint is **GRANTED** solely as to the PAGA claims for unpaid wages previously
17 brought under Section 558(a). Plaintiff shall file her amended complaint by **DECEMBER 12 AT**
18 **NOON**.

IT IS SO ORDERED.

21 Dated: November 23, 2019.


WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

25 * In October 2019, defendants filed a notice of settlement between our defendants
26 and a different plaintiff in a different litigation who had also asserted PAGA claims against
27 Brookdale. *See Callahan v. Brookdale Senior Living Communities, Inc., et al.*, No. 2:18-cv-
28 10726-VAP-SS (Judge Virginia Phillips). The notice purported that the settlement, still
subject to court approval, will fully settle the PAGA claims alleged by the named plaintiff
herein. This settlement has not yet been approved, and so, it is not sufficiently concrete to be
considered in resolving this motion.